**Welcoming the New Arrivals? Reception, Integration and Employment of A8, Bulgarian, and Romanian Migrants**

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**Abstract**

Despite the EU's emphasis on the need for effective reception and integration measures for migrant workers, people who come to the UK from the Accession States (the ‘A8’) can experience significant employment and welfare problems after their arrival. This is not helped by their inability to access the state support that is generally available to UK and other eligible EEA nationals. Most of the difficulties are the result of their status as Accession State nationals, restrictions on the ‘right to reside’ in the Immigration (EEA) Regulations 2006, and the recently re-enacted ‘habitual residence’ test (in the Persons from Abroad Regulations 2006). Some support schemes have their own ‘residence’ tests, and these include the somewhat bizarre ‘ordinary residence’ test for tax credits that can treat a person from an Accession state who is living here, but who does not have the ‘right to reside’, as ‘not being in the UK’. Unfortunately, this has helped to create what the Swedish government warned in 2004 could become a labour market divided into ‘first team’ and ‘second team’ players. In the UK the effects of the reception regime's restrictions are all too clear from research showing the difficulties such workers can experience when looking for work - and later when they have gained employment. This article assesses the current support regime, and the differences of approach taken by the three major host States admitting Accession State nationals after 1st May 2004, ie the UK, Ireland and Sweden. Consideration is also given to recent developments in international norms relating to migration for work, including the ILO's Multilateral Framework on Labour Migration (2006), and its promotion of a ‘rights-based approach’, and the UN Convention on the Protection of the Rights of All Migrant Workers and their Families 1990 (in force from 2003).

**Introduction**

The decision to admit Bulgaria and Romania to the European Union was controversial. As late as September 2006 the EC Commission was expressing concerns in accession monitoring reports about those countries' ability to come in to line with the EU's *acquis communautaire.* Indeed, some of the on-going problems in key areas of government and the economy of those countries prompted the Commission to emphasise that it would look to the ‘safeguards’ in the conditions of accession in case of failure to deliver on entry conditions.**1** Despite this, a final monitoring report concluded that both countries had been making sufficient ‘progress’ in their preparations for membership to merit their admission from 1 January 2007.**2** UK government policy on migration from the Accession States**3**, and support for UK employers' ability to ‘insource’ from those states to meet their needs, has not changed since 2004. Until recently it continued to see the many positive benefits to be gained from the enlargement project. As the Home Office Minister, Tony McNulty, said on 22 August 2006 when announcing Home Office statistics on migration for work into the UK, A8 workers ‘fill skills and labour gaps’ that are not being met from those born in the UK. The government's support was no doubt reinforced by studies in 2004**4**, and again in 2006.**5** For employers, the availability of Accession States' workers has been clearly giving them a greater pool of labour from which to recruit, as well as benefits from the skills, flexibility, ‘work ethic’, and retention that the migrant worker may offer.**6** In an influential report in 2006 the recruitment organisation Manpower considered that A8 migration is playing a ‘valuable role’, and indicated that although it is larger businesses that are more likely to take on A8 workers, there had also been a very sharp increase in recruitment by medium-size and smaller businesses.**7**

Despite this, the Commission's concerns were widely publicised. They also appeared to fuel much of the opposition in the UK to Bulgarian and Romanian entry, and the right of their nationals, post-accession, to migrate to the UK for work and residence. The reportedly high levels of organised crime in those countries, and the prospect of organised gangs of criminals entering the UK, reinforced calls for either a complete ban, or else closer regulation of entry by jobseekers and workers. The Home Secretary certainly gave that impression when addressing the Police Superintendents' Annual Conference on 19 September 2006. He argued that the ‘fresh challenges’ to law enforcement posed by this phase of enlargement meant migration from the two countries would have to ‘managed carefully’. The argument that the labour market is currently ‘over-supplied’ has also been increasingly potent. For example, the Chair of the Commons Home Affairs Committee (and ex-Home Office Minister), John Denham MP, called for a halt to entry, at least until there had been ‘more time to absorb the much bigger inflow of people from Poland and the other Eastern European states that's taken place over the last couple of years’. He said that there was pressure on services such as schools in places that had attracted many migrants, and he claimed that in his own area (Southampton) wages for local construction workers had dropped ‘dramatically’ as a result of the new workers. He noted that Home Office predictions in 2004 that around 13,000 A8 workers would come to the UK had proved to be wild underestimates and in addition to those who had registered for work under the government's Worker Registration Scheme (the WRS) there were others who had not - and he put the ‘true figure’ at between 600,000 and 800,000.**8** Obviously such anecdotal evidence of the perceived negative consequences of the effects of opening the labour market to new arrivals is relevant, and cannot be disregarded, especially when it comes from such influential sources. That said, the prevailing view among most economists has, for the most part, continued to be that migrant in-flows do not, in general, produce significantly negative impacts on labour market conditions. Even when they do, or are suspected of doing so, they are difficult to quantify, as it is in other jurisdictions like the USA, where the issue is also contested in the political domain and among economists.**9**

In 2004 the Home Office undoubtedly under-estimated the scale of net inward migration for work from Eastern Europe after estimates of entry for job seeking and work had been put at below 13,000 a year by Dr Herbert Brücker for the economic think-tank DIW Berlin commissioned by the European Commission *The Impact of EU Enlargement on Migration Flows* (Home Office On-line Report 25/03 at p 58), predicted a net in-flow of 5,000-13,000 until 2010. However, Dr Brücker defended the figures, pointing out that they were produced at a time when it was expected that all the existing EU states would open their borders to entry for work, and before it was known that only the UK, Ireland and Sweden would do so.**10** Opposition to further inward migration from Eastern Europe has also come from influential groups like the Local Government Association, which claimed that local councils have been struggling to cope with the pressure put on local services. Sir Sandy Bruce Lockhart, the Chairman of the LGA gave his support **11** to towns like Slough where the Chief Executive of the town council, Cheryl Coppell, had reported that ‘thousands of workers from the EU Accession States have descended on the town’.**12** Over the past eighteen months she said that 9,000 new National Insurance numbers had been issued in Slough, of which just 150 went to British nationals. Yet, in 2004, she said, the Office for National Statistics had only recorded 300 migrants settling in the area. The issue had become important because such statistics inform the allocation of central Whitehall funding for key services. Other towns in the UK, like Crewe, had reported similar problems, said the LGA Chairman, with 3,000 new arrivals from Poland alone; and he called for the government to recognise that its statistics were no longer adequate for calculating an area's needs for services. As the date for Bulgarian and Romanian entry approached influential sections of the media have been calling for either a complete ban or else ‘tough regulation’ of jobseeking, take-up of employment, and access to welfare **-** and as discussed later in this article on 24th October 2006 the Home Secretary gave them what they had been calling for.

In many ways this was just history repeating itself. In the lead-up to the admission of A8 nationals to the UK the government came under similar, intense pressure. Indeed, restrictions became a political necessity in the wake of doom-laden media prophecies about the threat to British jobs, and the spectre painted by some sections of the media of jobseekers and low-paid workers bleeding welfare, health, and social housing systems dry. In response, the government used its powers to derogate from free movement rights that are in the Accession Treaty and in the European Union (Accessions) Act 2003, s 2.**13** The government introduced a requirement that A8 workers would have to register under a new Worker Registration Scheme (WRS). This was primarily intended as a means of monitoring entry and take-up of employment, and to inform possible further restrictions based on evidence of labour market ‘disturbances’ should it become necessary to extend restrictions until 2011. However, compliance with registration requirements also informs the one-year period of continuous employment that is the gateway to the full range of welfare and in-work support rights that are already available to other EEA nationals. The political rationale for the bar was provided by the Prime Minister, and it was that the new arrivals should be able to demonstrate some ‘reciprocity’ for their support. Specifically, it would *only* be available to those who ‘come here to assist in meeting our skills shortages’, and ‘work hard’.**14**

**The Impact of Restrictions**

In the event, the restrictions introduced in 2004 have proved to be highly problematic for many Accession State jobseekers and workers. Low wages and poor conditions are often characteristics of the kind of entry-level employment available to such workers, even if the conditions may be part of a trade-off that suits them, particularly when this just a first step into other employment, and if it provides other valuable opportunities such as the acquisition of language and other skills.**15** Unfortunately the worker can be caught between two *very* hard places during this reception phase. One aspect is rooted in the labour market, and the other in the State welfare system. First, their susceptibility to exploitation in the labour market in terms of low wages, long hours, and otherwise adverse working conditions, particularly in some of the segmented labour markets that currently operate in the UK. Second, those difficulties are aggravated by barriers to access to welfare and in-work welfare support produced at the public law level of regulation, of the kind still in operation, despite changes made by the Social Security (Persons from Abroad) Amendment Regulations 2006, SI 2006/1026 (the ‘Persons from Abroad Regulations 2006’). Welfare needs that would normally be met by state welfare schemes that can ‘top up’ or supplement low wages, pay for housing costs or assist in periods between jobs are often *not* met.**16** These factors combine to ensure that many migrant jobseekers and workers habitually experience worse conditions than others in the host community in a comparable position. This group, and their dependants, are generally at the bottom of the social pile, experiencing disproportionate levels of welfare and job insecurity, and poor general ‘welfare’, a phenomenon borne out by statistical analyses of ‘poverty’ and social exclusion.**17** In a recent study of the employment conditions of Central and East European migrant workers in the UK, it was clear that despite having qualifications and skills significantly in excess of those required for their jobs, they experienced lower wages, and longer working hours, than the occupational average; and in many cases they had no paid holiday, sick leave, or even a written contract, and none belonged to a trade union.**18** Other research, conducted in 2005, indicated that as many as 90 per cent of the lowest-paid jobs in London are occupied by migrant workers, including both regular and irregular workers in terms of their employment status.**19** In many ways their experience just replicates that of workers in other host states, where trade liberalisation and measures like EU enlargement that facilitate migration for work have greatly increased the proportion of workers experiencing the problems of wage inequality.**20** The inability of such nationals to access income-related benefits that in most cases were designed to counter the effects of such inequality, including targeted income and wage income replacement benefits during periods of time between short-term, on-call contracts that typify many migrants' jobs**21** is a major cause of many Accession State nationals' problems during the reception phase. Furthermore, this is a deficit that highlights the glaring disparities in treatment when a comparison is made with UK nationals, or EU nationals from the E15 countries in a similar jobseeking or employment position. Litigation in 2004 raised doubts about aspects of the reception regime - and already, by then, some of the issues considered in judicial review proceedings were causing concern about Accession State nationals' reception arrangements.**22**

Before looking at these issues further, the current position on free movement for nationals from EEA states needs to be considered.

**Free Movement: The Rights of EEA Citizens**

Most rights that come with ‘free movement’ generally extend to nationals of European Economic Area (EEA) states. This is assisted by their status as ‘citizens of the European Union’.**23** In the UK context, in which there are different categories or gradations of ‘nationality’, the position is more problematic - particularly as it is left to the government to determine which of its nationals (or others with close links, indefinite leave, etc.) should be accorded EU citizenship, and which should not.**24** Article 18(1) of the EC Treaty confers free movement and residence rights on eligible nationals and linked to that are the related rights such as those conferred on ‘workers’ by arts 39-42, business people and the self-employed exercising the ‘right of establishment’ under arts 43-48, and other groups. The key provisions that deal with specific free movement rights for particular groups are now consolidated into Directive 2004/38/EC. This confers a general right of citizens of the Union and their family members to move and reside freely within the territory of the Member States. Nevertheless, the precise scope of rights on entry to another EU state, particularly for jobseekers, are subject to important limitations, and nationals of Accession States are one of the key groups affected by this.

**Accession State Nationals**

When the UK transposed the Directive 2004/38 into domestic law this year, in the Immigration (European Economic Area) Regulations 2006 (SI 2006/1003) from 30 April 2006 (the ‘2006 Regulations’), those regulations set out the specific free movement rights of EEA nationals in the UK. They also introduced several new features, including the ‘initial right of residence’. This is immediately qualified by reg 13(3)(b), under which the ‘right to reside’ ceases if the person or a family member becomes ‘an unreasonable burden on the social assistance system’. There is also a permanent right of residence after 5 years residence. However, they still operate in conjunction with other legislation, including the Persons from Abroad Regulations 2006, that places limitations on entitlements normally accorded to those with the ‘right to reside’: and these build on the restrictions made in 2004 already referred to.**25** Further restrictions are also in other key social welfare legislation, means-tested benefits regulations, and limitations that bar out rights to social housing under the Housing Act 1996, Part 6 (allocations), and Part 7 (homelessness). Specific exclusions are in schemes like the Allocation of Housing and Homelessness (Eligibility) (England) Regulations 2006 (SI 2006/1294) from 1 June 2006. Recent case-law illustrates how welfare agencies in the UK, in many cases because of the resource problems that they have, are reluctant to assist EEA nationals with housing, even when they are from E15 countries like Holland.**26** The position is, of course, worse for EEA nationals from A8 States. Given that one of the main problems facing many entrants is access to housing, particularly in the reception phase, the reluctance of the government to address this problem is very unfortunate.

Restrictions affecting Accession States' nationals during the accession ‘transition’ period take a number of forms, and these include a mandatory registration scheme for those obtaining employment. Again, this procedure is reserved for A8 nationals, unless they are exempt.

**The WRS Scheme**

The WRS Regulations, reg. 4, explicitly derogates from art 39 of the EC Treaty, Directive 2004/38, and freedom of movement. The regulations then go on to restrict the specific rights of Accession state jobseekers and workers. In particular, an A8 national who is seeking work in the UK cannot be treated as a jobseeker for the purpose of being a qualified person in reg 6 of the 2006 Regulations; and an A8 worker can only be treated as a ‘worker’ for the purpose of that definition while he or she is working for an authorised employer. A8 national who want to work in the UK are subject to registration requirements unless exempt, or they have ceased to be required to register. If a person starts employment *without* registering, for example when the employer wrongly (or deliberately)**27** advises that the person does not need to do this, it will usually mean that the person is *not* engaged in authorised employment during that period. This may then have serious consequences in terms of access to employment remedies that are dependent on a viable employment contract, given the way that the doctrine of ‘illegality’ works. In the case of Bulgarian and Romanian nationals who are genuinely self-employed, or who are in the UK to set up businesses, the Association Agreements between the EU and those countries already assist such nationals to work and reside in the UK - and in most cases it would not be necessary for them to register under the WRS in order to establish a right to reside.**28** Family members of a national required to register are also subject to a registration requirement. Without going through the registration process, and then gaining the required period of continuous service (12 months without interruption), a person cannot satisfy the requirements introduced by the Persons from Abroad Regulations 2006. The lack of the ‘right of residence’ may stop the person being ‘habitually resident’ in the UK. This, in turn, will bar them out of key state benefits, including Income Support, Jobseeker's Allowance, Housing Benefit and other income-related benefits.

One of the concerns about the WRS scheme is that, besides helping to track the number of entrants to the UK labour market, it does not really serve any useful purpose. Nevertheless, a failure to comply with registration formalities can create significant problems for the workers concerned, as well as employers**29** and other stakeholders in the process. It is likely that many Accession State workers do not register as they should do. This means that their employment has not been officially ‘logged’, and this can then delay their ability to access state welfare support that they would otherwise become entitled to. In some cases the failure to register may be due to reluctance on the part of employers to co-operate with registration formalities, particularly when they are operating in the informal economy, and when they want the employment relationship, and the terms on which it is operating, to stay invisible to official scrutiny. This is not uncommon when there are other aspects of the employment relationship that render the transaction ‘irregular’ - such as collusion with an employer who is not deducting tax or National Insurance. In many cases it is often the fault of an employer, agent or gangmaster that registration formalities are not observed, and it may often occur in conjunction with other irregularities such as a failure to deduct tax and National Insurance when wages are paid. This then has the potential to impact on the validity of the employment transaction, and enforceability of wages and other terms, something that has been a longstanding problem in the area of migrant workers' employment.**30** Unless it is clear that the worker's participation in such fraud is not his or her fault, for example where language difficulties mean that they have not understood what has been happening,**31** it will often be the worker who suffers the effects of such ‘illegality’. In particular, it may bar them out of employment proceedings against the employer if these are founded on the contract, or prevent a tribunal or court awarding a remedy in contract or tort-based actions.**32**

Concerns about the way the WRS scheme works, including its complexity and uncertainty about the precise requirements of registration (and the exceptions to the duty to register), have led to calls for it to be ended.**33**

**Reception and Integration of Accession State Migrants**

Given the vulnerability, susceptibility to exploitation**34** , and high levels of need that many Accession State nationals may have on arrival, particularly during their period of job seeking (and even after they have gained employment), it is not unreasonable to expect that host states like the UK should be doing more to improve their reception, integration, and support arrangements. The principles that should underpin these have been articulated in EU sources for some while: and with the growth in cross-border migration, and calls by organisations like the ILO to do more to respect the basic rights of migrant workers, the EU has recently revamped its guidance on the subject. This has included updated communications from the Commission. Although these have been directed, principally, at migrant workers from 3rd countries, the principles also extend to migrant workers from within the EEA area.**35** Among other things, they focus on the need to combat discrimination and social exclusion, building on principles developed since the European Council in Tampere. Since then, the expectation has been that host states should be implementing this through national action plans as part of the European Employment Strategy. Many of the principles involved are, in fact, already being implemented at a Community level, for example in measures aimed at extending to 3rd country nationals the same forms of social protection enjoyed by host states' nationals. The measures are intended, essentially, to off-set the disadvantages that such workers frequently experience in their employment, including low income and poor conditions in their employment terms as well as the problems resulting from discrimination. In this regard, the measures are linked to International Labour Organisation initiatives on ‘decent work’, and in the ILO's *Multilateral Framework on Labour Migration* (2006) that reinforce requirements directed at ensuring migrant workers are not treated less favourably than host state nationals.**36**

Despite some of the recent initiatives that are clearly capable of assisting Accession State migrants, for example measures to combat discrimination in the workplace,**37** there are still many aspects of the UK's reception regime which is far from welcoming. In analysing the issue, it is worth making some comparisons with the approaches taken in the other two main host states for Accession States' workers, Sweden and the Republic of Ireland.

**A10 Workers in Sweden**

Like the UK, Sweden has looked to Accession States' nationals to meet the needs of its labour market. In its main restatement of labour market policy and ‘tasks’, the Swedish government has said that the ‘big problem for Sweden” is that it has “a demographically based shortage of labor’.**38** Accordingly, as part of that policy the key governmental agencies involved - the Labor Market Administration (Arbetsmarknadsverket, AMV), the National Labor Market Board (Arbetsmarknadsstyrelsen, AMS), and the public Employment Service (Arbetsförmedling) - all became subject to the ‘overriding task’ of channelling labour to employers, and taking steps to combat recruitment problems. In its preparations ahead of 1st May 2004, Sweden took some important steps designed to pre-empt the risk of exploitation of new arrivals, and the real risk offered to agencies and employers to discriminate in the recruitment and employment process. In doing this it also sought to reduce the scope for irregular working. Although wide-ranging employment protection legislation was already in place,**39** in 2004 Sweden increased efforts to give full effect to relevant EC anti-discrimination measures and it appears to have done so with the specific needs of Accession State workers in mind. In doing so, and in securing protection for workers engaged in irregular employment, Swedish courts are not impeded by requirements that the labour contract is legally viable and consistent with migration laws. This may be contrasted with the UK position. In the UK, irregularities in the process of regulating entry to the host state territory and entry to employment (what may be termed ‘primary level regulation’) can then produce adverse consequences for a worker who then enters employment in a relationship that is essentially a private law one, but which continues to be regulated (at what may be termed ‘secondary level’ regulation). The regulatory regime that applies to migrant workers' employment transactions - including a cross-over effect, whereby public law regulation impacts negatively on the labour transaction operating at a private law level between the migrant and employer (or agent) - is a distinctive feature of the UK labour market, and it is replicated in other common law jurisdictions.**40** The problem focuses, in particular, on contract-based aspects of the employment, especially proceedings against the employer for unpaid wages. However, it has also been held to apply in proceedings where the complainant has sought to invoke statute-based rights, including rights deriving from EU law, as highlighted in cases like *Vakante.***41** In that case the worker concerned, a Croatian teacher, worked in breach of immigration restrictions while his asylum claim was being considered. It was held he could not pursue his case, even in respect of non-contract rights relating to alleged race discrimination reinforced by EC Council Directive 2000/43.

To coincide with the arrival of A10 workers from May 2004, Sweden made important adaptations to its domestic legislation to ensure that groups like migrant workers are protected against discrimination based on nationality, race, and ethnicity grounds, something which Sweden saw as an essential step. Like the UK, however, the government came under pressure to regulate access to the jobs market, and in particular to limit access to state welfare systems. So in March 2004, ahead of the arrival of new workers, it proposed transitional rules for the ‘good of all concerned’, and these were included in a package of changes presented in a Communication to Sweden's Parliament, the Riksdag, by the Minster for Migration Policy, Barbro Holmberg and Employment Minister Hans Karlsson.**42**

As in the UK and Ireland, measures were introduced to coincide with the admission of Accession State migrant workers, the government asserting that ‘a period of adjustment’ was needed. Among other things it proposed:

* *special work permit rules* for a transitional period for workers from the new EU Member States, giving due consideration to the vulnerability of individual workers and concern for Swedish workers' welfare and ‘good order’ in the labour market.
* *anti-discrimination ‘guarantees’* to ensure that new workers would enjoy the same rights and responsibilities as Swedish citizens, observing that ‘We do not want a guest worker system, in which workers are only permitted limited access to Swedish welfare. Nor do we want people to be exploited on the labour market in a way that would risk wage dumping and weakening of the terms of employment for all’.

They also considered that ‘the great differences in pay levels and social security between Sweden and the new Member States’ would lead to substantial strains on the employment and social systems resulting in a labour market divided into ‘first team’ and ‘second team’ players. Part of the concern was that low pay, and less favourable conditions of the second team would inevitably result in a transfer of costs to the state welfare system. It was noted, for example, that Swedish state benefits for the family would, in themselves, exceed a normal wage income in most of the new Member States. ‘A family with two children that has a third child while the father is working in Sweden may receive social benefits far in excess of the income they could earn in their country of origin.’

Given that it would be too easy for employers to ‘tempt people to take jobs at very low pay’, they proposed ‘a more transparent set of rules’.

Among other things, these principles informed measures to:

* *Avoid the creation of a ‘guest worker system’,* and to enable workers to report instances of exploitation. The proposals added that all Accession State nationals could ‘come to Sweden to work’. However, for the sake of those workers the job must be ‘a proper one, with pay meeting the terms of a collective agreement’.
* *Checking of tax payments and social security contributions* to prevent tax and social security abuse, particularly *the abuse of ‘self-employment’ status* using the F-tax card (Sweden's self-employed classification) by people who should really be classified as ‘employees’.
* *Ratification of ILO Convention 94 to prevent ‘social dumping’***.**

Whilst the government's initial proposals were not all adopted**43**, the Holmberg-Karlsson communication to the Riksdag committed Sweden to a radical review of labour and welfare systems to ‘adapt them to a globalised world’, so they can work in ‘a world in which people are becoming more mobile’. Despite its rhetorical and more aspirational features, the scheme contains several distinctive features that compare favourably with the UK's reception arrangements, particularly in seeking to ensure that entry-level employment would be in line with prevailing labour market conditions. In the UK it has become clear since 2004 that employers can and do engage new Accession State workers on less favourable terms and conditions than those prevailing. Indeed, some commentaries have gone further and suggested that the ability to displace existing staff is one of the advantages of having access to such workers.**44** There has been no rush in the UK to review or change aspects of the UK employment law that preserve a generous management prerogative to reorganise the workplace, and, if necessary, to carry out ‘economic’ dismissals as a means of containing labour costs.**45**

More recently, in 2006, Sweden reviewed its approaches to the reception of new migrants. As a result, the remit of the Swedish Integration Board extends to new migrant workers. It remains to be seen whether the positive principles that have underpinned Sweden's reception regime since 2004 will continue following the change of government this year. The Budget Bill 2007 indicates a growth in labour supply, and slow wage inflation, no doubt assisted by increased employment of A10 workers.

**Ireland and A10 Workers**

From 1 May 2004, the Republic of Ireland declared an ‘open access’ policy permitting unrestricted access to employment by Accession state workers. Speaking at a Council of EU Employment and Social Policy Ministers in Brussels he co-chaired with Ireland's Welfare Minister, Mary Coughlan, the Irish Labour Affairs Minister, Frank Fahey, said that ‘There continues to be a strong demand from Irish employers for overseas labour and we believe that our decision to allow free access to our labour market will be to everyone's advantage’. To coincide with Ireland's transformation from a country of emigration to one of net inward migration, Dail Éireann approved a comprehensive national ‘action plan’, the *National Action Plan Against Racism (2005-8).***46** This was designed to ensure that ‘racism has no place in the Ireland of today’, and ‘to welcome and manage our continuing development as a multicultural society’.**47**

Unlike the UK, Ireland has not limited access to its state welfare and social protection systems, at least while the migrant worker is ‘economically active’ in the Republic. Its welfare systems are not so generous with the economically *in* active. Ireland also operates a ‘habitual residence’ test to limit access to its state welfare schemes. This has proved as problematic as it is for UK-based workers given the short-term nature of much of the work available.

Irish Labour law regulates access to employment tribunals through a number of mechanisms, including status and service requirements and ‘gateways’ (and using criteria that can impact markedly on migrant workers who cannot meet such requirements). This means that it has comparable status restrictions to the UK's. For example, a migrant worker with less than a year's service with the employer, or who is employed on fixed-term or task contracts (which in many cases the migrant worker will have, often through an agency) is excluded from the right to claim unfair dismissal.**48** In practice, as in the UK, migrant workers can find it difficult to achieve the necessary period of one year's continuous service that will then enable them to achieve parity with other workers and enhance their employment protection. Despite working legally, many workers currently have a propensity to be employed in atypical forms of employment. As in the UK, ‘atypical’ in this context means that the work is often short-term, and prone to ‘stops’ and ‘starts’ that prevent completion of the requisite periods of continuous service on which so many UK employment rights now depend. As with the UK's agriculture sector, Irish farms are now heavily staffed by Accession state and 3rd country workers. Given the temporary and seasonal nature of this employment they can be subjected to potent limitations affecting basic employment rights, and this is problematic for this very large sector of the workforce. In practice, they find that even relatively short gaps in ‘continuity’ can bar them from key labour rights.**49** As in the UK, it is not unusual for employment to be terminated shortly before the required one year service is achieved, thereby depriving the person of the right to claim unfair dismissal. Unlike the UK, though, there does not appear to be such a widespread culture among agencies of trying to classify and organise work in ways that will bar the job-holder from satisfying the main UK gateway to employment rights, namely ‘employee’ status. In particular, it is increasingly common in the UK for new employment to be organised in a way that ensures it lacks the characteristics of a contract of employment, and ‘mutuality’. This relegates the worker to the status of being ‘self-employed’, and removes him or her from mainstream employment protection; and the same approach is frequently taken when re-engaging workers after economic dismissals.**50** In marked contrast to the UK position, the fact that employment is tainted by ‘illegality’ is specifically *not* a bar to a claim for unfair dismissal claim, as made clear under the 1977-2001 Acts. However, it may affect *other* contract-based rights (something which Ireland still has in common with the UK and other common law jurisdictions). Furthermore, proceedings are subject to ‘interventions’ by interested governmental agencies, eg the Irish Revenue Commissioners and Ministry for Social Welfare.

The position in relation to people from non-EU countries, and countries outside the EEA, is much stricter. Without a Working Visa or Work Authorisation employment is illegal, although the Seannad Éireann and Dail have debated relaxations. There are also administrative sanctions, for both employers and workers. So, in practice, migrant workers in the Irish Republic do experience the disadvantages associated with migrant worker status in other EU countries.

As with the UK, there are aspects of Ireland's reception regime that have some significant shortcomings. Other aspects of it, though, are very positive. In particular, the Irish Labour Court's jurisprudence has at times displayed a very supportive approach to safeguarding the workplace rights of non-nationals and migrant workers. Thus, in *Campbell Catering Ltd/Aderonke Rasaq* EEDO48 (Labour Court) the summary dismissal of a worker in an asylum refuge was held to amount to race discrimination given the peremptory manner of her summary dismissal for alleged theft. The Court made the important observation that, in applying anti-discrimination legislation, account had to be taken of the needs of migrant workers, and a failure to do so could, in itself, be regarded as ‘less favourable treatment’.

In *Citibank/Massinde Ntoko* EED045 (Labour Court) a worker from the Democratic Republic of the Congo was disciplined for making an unauthorised telephone-call. After overhearing the worker speaking in French at the workstation of a co-worker, he was dismissed, but without an opportunity to explain what had happened, or to defend himself. This prompted a work stoppage by other staff that complained of harassment and less favourable treatment. The court upheld a complaint of special unfavourable treatment, finding that a worker of Irish ethnic origin would not have been treated in the same way. Despite being employed in a temporary capacity, an atypical status in Ireland that is common among migrant workers in service industries, the court awarded compensation *as if* he were in permanent employment, and at a level which was ‘proportionate, effective, and dissuasive’, reflecting the fact that he had been humiliated and deprived of the right to equal treatment as a migrant working in the Republic who was entitled to ‘protection against racial prejudice’.

**ILO and Other International Norms**

Increased cross-border migration for work resulting from globalisation and trade liberalisation has meant that more migrant workers than ever before are entering host states' territories for work.**51** Consequently, there is a pressing need for effective international norms to regulate reception and integration systems. However, the rationale for such norms does not just focus on the long-recognised propensity for migrant workers to be exploited, particularly in the reception phase. Plainly there are other interest groups and stakeholders affected when new entrants to host labour markets are engaged on terms that are not in line with prevailing conditions. Furthermore, regulation in this context is also about the pursuit of an agenda directed at preventing uncompetitive trading conditions in a global labour market. As Bob Hepple has reminded us, one of the oldest arguments for transnational regulation is that world trade is between countries with different levels of labour rights and labour costs. “Social dumping”, the production and export of products that owe their competitiveness to low labour standards encourages a ‘race to the bottom’ with distortions produced by undervalued labour.**52** Such sentiments have recently prompted the ILO to review the operation of the norms set out in its key measures, including ILO Conventions 97 (1949), 111 (1958), and 143 (1975), and accompanying Recommendations. Unfortunately, many of the standards have become problematic, in the way that they exclude large sections of the migrant workforce if they are outside the concept of ‘regular’ work - or are engaged in irregular working. Unfortunately, this does not take into account the complex reasons that now operate to make employment ‘irregular’ and which can take workers outside the scope of mainstream national protection.

Migration for work, and insourcing, facilitated by trade liberalisation measures like EU enlargement and ‘freedom of movement’ have conferred significant benefits on UK employers, the economy, and other stakeholders. However, from the migrant worker's perspective the process often brings with it some significant employment and welfare problems. Many workers finding themselves in atypical forms of wage labour, not least, casual and agency work, and work of limited duration that are often outside the scope of ILO measures. Furthermore, the complexity of many migration-for-work schemes, and the increasing inter-action between migration and employment status, produce status “gateways” that can be very problematic. These have the potential in some jurisdictions like the UK and Ireland to bar out access to even the most basic labour rights and remedies. This is relevant to most migrants, but is particularly difficult for those in irregular employment, and particularly when complex arrangements like the WRS scheme operate to exclude workers from mainstream employment rights.

The complexity and range of forms of irregular working means that there are clearly groups of workers within that population who merit basic employment protection. It is no longer appropriate for international norms to go on adopting a blanket approach that removes basic employment rights from *all* such workers, irrespective of the type of “irregular” category, or the reasons why their employment is ‘irregular’.

**The Multilateral Framework**

The ILO's adoption of the *Multilateral Framework on Labour Migration* in 2006 has clearly been an important development, bringing together the core ILO principles that host states should be translating into substantive rights.**53**. It promotes the ILO's ‘Decent Work’ agenda, and emphasises the ‘integrated approach’ that the ILO and most states, and the EU, recognise are being generated by increased migration for work. In formal terms it gives effect to the conclusions and resolution of the ILO Conference in 2004 on ‘a fair deal for the migrant worker in the global economy’.**54** Among other things, the *Framework* has positive features such as the promotion of co-operation between governments and interest groups in the management of migration for employment. While upholding the right of sovereign states to develop their own policies to manage labour migration, it emphasises the need for greater recognition and protection of migrant workers' human rights, including rights at the private law level when employment transactions are made and operate. In a key section in Principle V it states that the ‘human rights of all migrant workers, regardless of their status, should be promoted and protected’. This relates, primarily, to the principles and rights in the 1998 ILO *Declaration on Fundamental Principles and Rights at Work and its Follow-Up,* reflected in the eight ‘Fundamental ILO Conventions' - although it clearly reinforces key regional measures like the European Convention of Human Rights. To that extent it reinforces legal rights that are capable of enforcement in major host states like Sweden, Ireland, the UK. It also includes ‘guidelines’ that reinforce the ‘practical effects’ of the Principles. As a minimum, it expects states ‘to take into account’ ILO Conventions, as well as the UN *Convention on the Protection of the Rights of All Migrant Workers and their Families* 1990. If that Convention has been ratified, as is increasingly being done, then the ILO requires the state to ensure that its provisions are ‘fully implemented’ (Guideline 9(b)), in the same way that other ILO Conventions at that point become binding and mandatory.

Despite these helpful features, the *Multilateral Framework* is not in *itself* binding on states. Specifically, it comprises ‘Non-Binding Principles and Guidelines for a Rights-Based Approach to Labour Migration’. Furthermore, there are still some clear inconsistencies between the requirements and standards in the eight ‘fundamental’ ILO Conventions and the standards set by other bodies like the UN, including those set out in the 1990 UN Convention. An important example is that whereas ILO Conventions continue to exclude from the scope of their protection workers who are not lawfully within the host state's territory (C97, art 6), or who are not in ‘regular’ employment, the UN Convention 1990 (in force since 2003) goes much further. In particular, it extends a package of minimum, basic rights to all workers, irrespective of their migration status. Some of those rights are particularly relevant to workers in the reception phase and when they take up new employment.

**The UN Convention 1990**

A detailed analysis of the Convention is not proposed here.**55** However, a number of points may be made as these are relevant to reception arrangements for Accession State nationals, including those in irregular employment for these reasons already considered.

In a key passage the Preamble to the Convention states:

‘Workers who are non-documented or in an irregular situation are frequently employed under less favourable conditions of work than other workers’,

and adds that

‘certain employers find this an inducement to seek such labour in order to reap the benefits of unfair competition.’

For that reason, as well as the others that are articulated in the Preamble, the Convention's entry into force has been a particularly important development. It offers an important opportunity to adopt a new approach based on what would seem to be a very sound principle. Namely, that whatever a host state chooses to do when imposing conditions on access to its territory, and at a public law level, when it comes to basic employment rights workers should be able to enjoy a basic package of rights that is no less favourable than that which applies to nationals of the state of employment, and other workers accorded such rights. That includes the right to go to court, and access employment remedies as part of a wider development of effective reception and integration measures.

This is particularly apposite in relation to wages and other key conditions such as hours of work, rest periods, health and safety.

Part III of the Convention requires host states to ensure that *all* migrant workers can benefit from a basic package of minimum rights, irrespective of their immigration status. For present purposes this is particularly helpful for those in atypical employment, including the kind of casual, short-term, and agency types of entry-level employment of the kind often in engaged in by Accession states' nationals. It would also assist workers adversely affected by procedural irregularities that could impact on the validity or enforceability of employment terms; and where access to labour law remedies may have been prejudiced. Obviously, this is very relevant in situations where employment is ‘irregular’, including cases where WRS requirements have not been complied with. It is not uncommon, for example, for a worker who thinks he or she has completed the requisite 12 months service with an authorised employer (thereby obviating the need for further registration) to start new employment when this is *not* the position. Typically, there have been ‘interruptions’ during that period that total more than 30 days; and that means the worker remains subject to registration and will be working illegally in terms of WRS requirements.**56** A key provision is art 25. Article 25(2) stipulates that it shall not be lawful to derogate in private contracts of employment from the principle of ‘equality of treatment’. Article 25(3) is then important in requiring that states' measures must ensure that migrant workers are not deprived of rights that derive from the equality principle by reason of ‘any irregularity in their stay or employment’. Clearly states must also ensure that their labour law systems at the secondary level do not enable employers to utilise “illegality” and similar defences. Specifically, ‘employers shall not be relieved of any legal or contractual obligations’ by reason of irregularities. Unfortunately, this is precisely what happens in the UK and, to a lesser extent in the Republic of Ireland. Clearly, the Convention does not, and did not intend, to confer equality in the sense of attempting to confer the same labour and social rights on *all* workers. In particular, it acknowledges that there should, be limits to the rights of those in irregular employment. The further rights in Part IV, including other rights relating to freedom of movement, education, training, and other social rights can continue to be reserved for workers in regular, documented employment.

Since 2003 there have been increasing numbers of ratifications. However, it is significant that EU states and the major non-EU host states have been slow to ratify the Convention. Indeed, no major host states have done so, to date. Of the states that *have* ratified, some have insisted on derogations that enable matters such as remuneration, dismissal rights, employment periods, hours, to *go on* being governed by the parties' contract, and by the private law arrangements made between the employer and worker.**57** Needless to say, such derogations have the capacity to undermine the Convention's objectives.

**Conclusions**

The current reception regime has been producing significant problems for A8 and other EEA nationals. This has particularly been the case for jobseekers and those in low-paid employment with limited resources to meet what can be high levels of housing and other welfare need. As a result of the restrictions announced by the Home Secretary on 24 October 2006,**58** Bulgarian and Romanian jobseekers will not have an automatic right of to take up vacancies in the UK from January 2007.**59** Whilst having the right to enter the UK, they will in most cases be restricted in their ability to access income-related benefits or other support schemes. In effect, they will therefore become the third and most disadvantaged of the three EEA groups. The fear must be that the combined effect of being barred out from mainstream employment and state welfare will mean they are far more likely to undertake employment in the informal labour market, and thereby be at considerable risk of being barred out of mainstream employment rights and protection: and the imposition of fixed penalty notices on employers illegally employing them is likely to impact more heavily on the workers concerned given that this will underline the ‘illegality’ of the employment transaction.

Even allowing for public and media concerns about aspects of Bulgarian and Romanian accession, it is not entirely clear why the UK government has decided to introduce such restrictions at this critical stage in the enlargement project. The political advantages of being seen to be ‘tough on immigration’, and ‘in control’ (particularly following earlier debacles this year in the Home Office) are clear enough. A further factor is the potency of the argument that the labour market is becoming ‘over-supplied’ since 2004, particularly in relation to new arrivals with low skills - and that pending the removal of all controls on EEA nationals' access to the UK labour market in seven years' time there should be a bar on low-skilled entry, and more selective ‘cherry-picking’ of entrants with skills.**60** This is also, to some extent, informed by growing concerns in government and among policy-makers that the concentration of A8, E15 and non-EU workers in London and the South-East may be aggravating the exceptional and atypical labour market problems London experiences, and the capital's current high levels of unemployment (that are out of line with other regions).**61** This has been underlined in a separate move, announced at the same time as the restrictions on Bulgarian and Romanian nationals, that all access to the UK on low-skilled work schemes from outside the EU is being phased out, starting from 1 January 2007.

Despite such explanations, it is a concern that the government should be taking such measures with minimal debate and legislating by ‘Written Ministerial Statement’ in this way. It is also unfortunate that it proposes to maintain restrictions on access to income-related benefits and other support schemes in ways that will undoubtedly impact negatively on all new arrivals from EEA states. For those with special needs, and who require assistance with housing, the planned extensions to the limitations on Housing Act 1996 schemes are particularly regrettable.**62**

It is very much to be hoped that the current disparities in treatment affecting EEA nationals will be removed, if not soon then certainly by the time the restrictions on Bulgarian and Romanian arrivals are reviewed in a year's time.**63**

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1. Act Concerning the Conditions of Accession of Bulgaria and Romania, Official Journal (OJ) 2005 L157/203.
2. 27th September 2006: Presentation to the European Parliament by the EC Commission President, José Manuel Barroso, and Olli Rehn, EC Commissioner for Enlargement.
3. Poland, Hungary, Slovakia, Slovenia, Lithuania, Latvia, Estonia, Czech Republic, Malta and Cyprus (the ‘A10’). They are referred to as the ‘A8’ in the UK as Malta and Cyprus nationals already enjoy the same rights as other EEA nationals from States in the EU in 2004 (the ‘E15’).
4. S Sriskandarajah et al (2004) *EU Enlargement and Labour Migration* (Institute of Public Policy Research, 2004). The business and financial sectors identified advantages, including reductions in labour shortages, and downward pressure on wages: and by helping to reduce the age of the labour force migration from the A8 would ‘reduce labour costs to companies, thus boosting profits’; ITEM Club/Ernst & Young *The Impact of EU Enlargement on the UK Economy* (Economic Update, March 2004). As more recent updates indicate, the boost to labour supply is reflected in higher output and GDP: and although unemployment rises and capital intensity and labour productivity may fall, in the longer term key sectors of the economy are beneficiaries, such as manufacturing and exports; ITEM Club/Ernst & Young *UK Economic Prospects* (Spring 2006 Forecast).
5. N Gilpin, M Henty, S Lemos, J Portes, and C Bullen *The Impact of Free Movement of Workers from Central & Eastern Europe on the UK Labour Market* (Department of Work and Pensions Working Paper 29, 2006).
6. ‘Employers’ Use of Migrant Labour’ (London: Home Office/Institute of Employment Studies, March 2006 www.homeoffice.gov.uk/rds) 5-7, and 29-36; and B Anderson, B M Ruhs, S Spencer (ESRC Centre on Migration, Policy & Society, University of Oxford), and B Rogaly (Centre for Migration Research, University of Sussex) *‘Fair Enough? Central and East European Migrants in Low Wage Employment in the UK’* (London: J Rowntree Foundation, May 2006) 104-106. More recently, in a keynote speech the CBI's new Director -General, Richard Lampert, put the CBI at odds with other business organisations, including the coalition of large companies Business for New Europe, by warning against a ‘fresh wave of cheap labour from Eastern Europe’, and calling for a ‘pause’ before the ‘next wave of newcomers”; ‘Migrants Threaten Social Fabric, says CBI Chief’ in *The Guardian* 6 September 2006.
7. *EU Enlargement - Two Years On*, Manpower, May 2006.
8. BBC Radio 4 *The World at One,* and *Ex-minister calls for block on new EU migrant workers,* Guardian Unlimited 15th August 2006. In fact the most recent figure, published by the Home Office on 22 August 2006, indicates that 447,000 people applied to the Worker Registration Scheme in the two years from May 2004 to June 2006, and 427,000 were approved; and see the *Accession Monitoring Report May 2004-June 2006* (Home Office, DWP HMRC et al, 22 June 2006). There are undoubtedly people working who should have registered - but it is also likely that many new arrivals have left the UK or are no longer working.
9. See, for example, the discussion of US in M Trebilcock and M Sudak *The Political Economy of Emigration and Immigration* (2006) NYU L. Rev 81:1, including commentary on an influential study by the National Research Council in 1997.
10. Nicholas Watt *Home Office Used Wrong Figures to Predict ‘Trickle’* in *The Guardian* 2 September 2006.
11. Philip Johnston *Immigrants ‘Swamping’ Council Services* in *The Guardian* 28 June 2006.
12. BBC Radio 4 *Today* 27th June 2006.
13. *UK and Ireland only States to accept full free movement for EU accession countries?* (2004) Vol 19(1) *JIANL.*
14. Prime Minister's Official Spokesman, 9th February 2004. The points were then implemented by the Accession (Immigration and Worker Registration) Regulations 2004, SI 2004/1219 (the ‘WRS Regulations’); and the Social Security (Habitual Residence) Amendment Regulations 2004, SI 2004/1232 (see now SI 2006/1026), imposing restrictions on the take-up of employment and State welfare.
15. See the discussion by E Weinstein, *Migration for the Benefit of All: Towards a New Paradigm for Economic Migration* International Labour Review Vol. 141, No.3; and see the *‘Fair Enough?’* study, n. 6 above, at p 103.
16. In Tribunal of Commissioners Case CH/2484/2005 (Feb 2006) it had been held that the ‘right to reside’ test was incompatible with art 12 of the EC Treaty. The claimant therefore satisfied the ‘habitual residence’ test for Housing Benefit and Council Tax Benefit. This was overturned on appeal as she did not come within any of the criteria for demonstrating a ‘right to reside’ (either under EC or UK law) so she could not be habitually resident. Whilst accepting that the legislation in question was discriminatory it was ‘objectively justified’ and ‘proportionate’.
17. J Flaherty, P Veit-Wilson, I Dornan *Poverty: The Facts* (London: Child Poverty Action Group, 2004) at 199-201. See also G Palmer, J Carr, and P Kenway *Monitoring Poverty and Social Exclusion 2005* (York: New Policy Institute/Joseph Rowntree Foundation, 2005) where poverty indicators go beyond wage income, and include social exclusion factors like dependency on State benefits, exclusion from vocational training, and health; and see ILO data in *ILM Statistics,* and reports in *Global Employment Trends* (ILO, 2006).
18. *‘Fair Enough?’* study, n.6 above, at pp 29-65.
19. Y Evans, et al *Making the City Work - Low Paid Employment in London* (Queen Mary College, London University, 2005). A large proportion of the 427,000+ A8 registrations (as at August 2006) were in London.
20. Reports in *Global Employment Trends* (International Labour Office, 2006); and *OECD Employment Outlook 2006* (OECD, 2006).
21. K Puttick *Welfare Benefits and Tax Credits - Law and Practice* (XPL/EMIS Publishing, 9th edition, November 2006), pp314-316. By excluding Accession State nationals from key benefits, they are also thereby excluded from important ‘passported’ entitlements that would also normally be available to claimants and dependants.
22. For example, see *R (H and D) v Secretary of State for Work & Pensions* [2004] 3 CMLR 11. More recent cases highlight the scope of restrictions on housing and welfare in the Nationality, Immigration and Asylum Act 2002, Sch 3; see *R (Conde) v Lambeth LBC* [2005] HLR 29; and *R (Mohamed) v Harrow LBC* [2006] HLR 18.
23. Art. 17(1) of the EC Treaty.
24. *R v. Secretary of State for the Home Department, ex parte Manjit Kaur (Justice, Intervening)* (Case C-92/99) [2001] 2 CMLR 24, ECJ.
25. N.14, above. Before that, the Immigration (European Economic Area) Regulations 2000, SI 2000/1813 contained the key provisions implementing freedom of movement rights. Judicial support for the ‘habitual residence’ test has been reiterated recently in *Collins v Secretary of State for Work and Pensions* [2006] 1 WLR 2391, Court of Appeal, although cf *R (Bidar) v Ealing LBC* [2005] QB 812, ECJ.
26. *Barnet LBC v Ismail* [2006] HLR 23, Court of Appeal when an attempt by the council to withhold housing assistance under the Housing Act 1996, Pt 7, failed: but it prompted the government to announce that it would introduce new regulations that would be effective in barring out claimants in the future.
27. Apparently it is not uncommon for employers to deliberately seek to delay registration to prevent the person gaining 12 months continuous employment, with negative consequences including difficulty in accessing employment rights dependent on lawful employment, the right to claim unfair dismissal, and so forth; Thomas Lamb of Solicitors New Alyth, Perth and Kinross *Britain's appeal to migrant workers* in *The Guardian* 5 September 2006.
28. Reference may be made to SI 2006/1003, Part 1 and the Immigration Rules, paras 211 et seq.
29. The WRS Regulations, reg 9 makes it an offence for an employer to employ an A8 worker requiring registration while not being an ‘authorised employer’. Employers' perceptions of the WRS vary: some are hostile, and others claim not to be aware of it; *Fair Enough?* study, note 6, pp101-103.
30. Typically, in areas like restaurant and hotel work, and segmented sections of the labour market: *The Informal Economy: A Report by Lord Grabiner* (HM Treasury, March 2006) 2-5.
31. A leading case is *Wheeler v Quality Deep Ltd (t/a Thai Royale Restaurant)* [2005] ICR 265, Court of Appeal. Said Hooper LJ: ‘This is a very unusual case concerning as it does a foreign national working in this country in her own language with limited knowledge of the English language and of the tax and national insurance provisions of this country. Had she not had that limited knowledge she may well not have succeeded.’
32. It is often the employer who invokes ‘illegality’: essentially as a means of avoiding liability, even when it is their own illegal behaviour, rather than the employee's, that is in issue; for example, see *Hewcastle Catering Ltd v Ahmed and Elkamah* [1992] ICR 626, CA (when waiters had been required to participate in the employer's VAT fraud).
33. B Ryan (ed) *Labour Migration and Employment Rights* (London: Institute of Employment Rights, 2005), p.28.
34. Across most economic sectors, migrant workers from Eastern Europe surveyed in the Rowntree research in 2006 (see Note 6) appeared to have lower earnings, and generally fared worse than the prevailing conditions for their occupations even where they had clear legal rights, eg less than half (worse in some sectors) had any paid holidays despite this being a legal requirement under the Working Time Regulations 1998, SI 1998/1833. For earlier research, see *Nowhere to Turn: CAB Evidence on the Exploitation of Migrant Workers* (National Association of Citizens Advice Bureaux, 2004); and see *Supporting Migrant Workers in Rural Areas* (Citizens Advice, 2006). This is consistent with the experience of migrants' entry-level conditions in other host states; see *International Migration Outlook* (Recent Trends, Part 1) (OECD, 2006).
35. See the ‘Communication from the Commission to the Council, the European Parliament, the European Economic and Social Committee and the Committee of the Regions on Immigration, Integration and Employment’ (COM (2003) 336 Final); and, more recently ‘A Common Agenda for Integration: Framework for the Integration of Third-Country Nationals in the EU’ (COM 2005 389 Final).
36. ILO Conventions 97 (art 6), 111 (arts 1, 2), and 143 (arts 1-12). Convention 97 requires States ‘to apply, without discrimination in respect of nationality, race, religion or sex, to immigrants lawfully within its territory, treatment no less favourable than that which it applies to its own nationals’.
37. Mark Bell ‘Implementing the EU Racial Equality Directive: implications for immigration law’ (2004) Vol 18 No 1 *IANL,* p.39.
38. *Swedish Labor Market Policy* FS6-Y (Stockholm: Swedish Institute, May 2005) 6.
39. Including the Security of Employment Act 1974 (LAS 1974, revised in 1982); the Measures to Counteract Ethnic Discrimination in Working Life Act 1999 (SFS 1999:130); the Employment Protection Act 1982 (SFS 1982:80); and the Prohibition of Discrimination Act 2003 (2003:307).
40. See, for example, the Canadian case of *Re Still and Minister of National Revenue* (1997) 154 DLR (4) 229; (1998) 1 FC 549. The burden of proof is usually on the party alleging illegality/unlawful performance, who is in many cases the employer: *Colen v Cebrian(UK) Ltd* [2004] IRLR 210, Court of Appeal; *Halsbury's Laws of England* Vol 16(1A)18; and R Buckley *Illegality and Public Policy* (London: Sweet & Maxwell, 2002).
41. *Vakante v Governing Body of Addey & Stanhope School (No 2)* [2005] ICR 231, Court of Appeal. Following implementation of the Directive in the UK, it is likely that if such proceedings were started now, and were well-founded, there would be a different result. For a discussion of illegal working and commentary on this important case, see B Ryan ‘The Evolving Legal Regime on Unauthorised Work by Migrants in Britain’ (2006) Comparative Labor Law and Policy Journal 27-1.
42. *Employment Transitional Rules for All Concerned* (Holmberg-Karlsson Communication:15 March 2004).
43. Parts of the package were rejected, in some cases after an alliance of business and union groups, and opposition by Left and Right groupings in the Riksdag.
44. ‘Bottlenecks [in access to skilled labour] can typically be eased more rapidly and effectively now by importing skilled workers from the Accession countries. Indeed, anecdotal evidence suggests that UK employers are finding ways to replace elements of their workforce by this labour.’; Item Club *UK Economic Prospects* (Spring 2006 Forecast) (London: Ernst & Young), at p 14.
45. ‘Economic’ dismissals are generously catered for by the UK's redundancy system: *Murray v Foyle Meats Ltd* [2000] AC 51. There is no ‘right to remain in a job’, and opportunities to contest employers' reasons for displacement dismissals are negligible: R Painter and K Puttick *Employment Rights* (London: Pluto, 3rd ed 2006) pp. 321-337.
46. Ireland’s *National Action Plan Against Racism:An Plean Gniomhiocht Naisiunta In Aghaidh An Chiniochais* (2005-8).
47. In the Plan’s Foreword by the Taoiseach, Bertie Ahern, TD.
48. Unfair Dismissal Acts 1977-2001.
49. Such a ‘seasonal worker’ case was *J v Nestle UK Ltd* Employment Lawyers Briefing Vol 9 (No 9) 143.
50. As in the leading case of *Stevedoring & Haulage Services Ltd v Fuller & Others* [2001] IRLR 627, CA.
51. For current trends, see the ILO's *International Labour Migration Statistics* (ILO, 2005); *Global Employment Trends* (International Labour Office, 2006); *Trends in International Migration* (Paris: OECD, 2006).
52. B Hepple *Labour Laws and Global Trade* (Oxford & Portland, Oregon: Hart Publishing, 2005) 13-15. It was said in debates on European migration at the 2006 Trades Union Congress, that the best way to ensure that the existing labour market terms and conditions are not ‘undercut’ is to ensure stronger employment rights extend to all workers, including migrants; TUC General Council's Report, ch. 5 on Global Solidarity.
53. Adopted by the Tripartite Meeting of Experts on the ILO Multilateral Framework on Labour Migration (Geneva, 31 October - 2 November 2005).
54. Issues discussed at the 92nd Session of the ILO Conference 2004, culminating in agreement to initiate a ‘plan of action’ for migrant workers. See *Towards a Fair Deal for Migrant Workers in the Global Economy* (ILO, 2004).
55. For a fuller discussion see P Taran, *For Millions of Migrants - A New Convention* in *The World of Work* (ILO Magazine) No 48, Sept 2003, p 22; and on the Convention and other standards, see S Gibbons ‘International Agreements on Labour Migration’ in B Ryan (ed) *Labour Migration and Employment Rights* (2005, Institute of Employment Rights), ch 6.
56. WRS Regulations 2004, reg 2(3), (4), and (8). It is clear that if a worker is not properly registered she or he cannot be ‘legally working’ as a result of the way regs 7-9 have been worded.
57. P Taran *For Millions of Migrants - A New Convention* in *The World of Work* (ILO Magazine) No 48, Sept 2003, p 22. As at 8 May 2006 there were 27 signatory States and 34 parties.
58. Written Ministerial Statement to the House of Commons on Romania and Bulgaria by the Rt. Hon. John Reid, Secretary of State for the Home Department, 24 October 2006.
59. *Controlled Access to UK Labour Market for New Accession Countries* Home Office 25 Oct 2005. Key points are that a limited number of workers will be able to work in the food processing and agriculture industries. Otherwise, skilled workers can obtain a work permit or demonstrate eligibility under the highly skilled category of the Highly Skilled Migrant programme. Access to low skilled schemes will be subject to ‘quotas’ and capped at 20,000 a year; and A2 workers on schemes will be limited to 6 months work and barred out of benefits and social housing. The WRS scheme is to continue but will not apply to Bulgarians and Romanians. There are no specific limitations on use of the ‘self-employed’ worker route: so many more entrants are likely to seek to enter the labour market on that basis than would be the case without such controls.
60. EEA transitional restrictions on this group have been aligned more closely with the ‘points’-based approach started earlier this year. This is consistent with other states that have moved away from a general open-door approach and towards selective admission, as described in Ayelet Schachar *The Race for Talent: Highly Skilled Migrants and Competitive Immigration Regimes* (2006) NYU L.Rev. Vol 81:148.
61. *Employment Opportunity for All: Analysing Labour Market Trends in London* (HM Treasury, Budget Report 22 March 2006).
62. See the discussion of the *Barnet LBC v Ismail* case above, and n.26.
63. A process to be undertaken with the assistance of a new Migration Advisory Committee.